United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

DOCKET NO. 76-1076

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CARLOS CUADRADO, ROBERT MUNOZ, JAMES SIMS,

Defendants-Appellants.

DEFENDANT-APPELLANT CUADRADO'S BRIEF

Respectfully submitted,

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the District Court Judge commit error in failing to voluntarily recuse herself?

B. Were the totality of the facts and circumstances of this case sufficient to show a prejudgment and bias by the judge toward this Defendant?

C. Did the sentencing judge make an inaccurate and incorrect supposition as to a prior conviction of this Defendant?

D. Was the sentence imposed upon this Defendant a fair and just one under all the facts and circumstances in this case?

STATEMENT OF THE CASE

The Defendant CARLOS CUADRADO is presently incarcerated serving a sentence of five (5) years, imposed by Hon. Constance B. Motley on January 23, 1976 after pleading guilty on January 17, 1975 to a violation of Title 18, U.S.C., Section 371.

The judicial history of this case began when this Defendant, on or about March 12, 1974 testified before a grand jury for the United States District Court for the Southern District. Thereafter he was indicted for perjury, violation of Title 18, U.S.C., Section 1623 under Indictment No. 74 CR 544. The Defendant pleaded not guilty on June 12, 1974 and this case was assigned to Hon. John M. Cannella.

On October 4, 1974, after intensive discussions among the Defendant, Assistant United States Attorney Kenneth R. Feinberg, and Defendant's Attorney, with a representative of the Federal Bureau of Investigation and the Internal Revenue Service being present, an agreement was worked out as follows:

The Defendant was to testify before the Grand Jury concerning pipe bombings by members of the Black and Puerto Rican Coalition of Construction Workers, help the Assistant United States Attorney in preparation for trial involving such matters, and testify at the trial. In return, the Defendant was promised dismissal of the perjury indictment against him, immunity from prosecution by the Internal Revenue Service and New York State, a

plea of guilty to one count of the forthcoming indictment for conspiracy and a statement by Assistant United States Attorney Feinberg at time of sentence indicating Defendant's cooperation with a view towards keeping the Defendant out of jail.

The Defendant testified before the Grand Jury on October 10, 1974. An indictment was found for conspiracy and other related charges. He was arraigned under Indictment # 74 CR 1010 on October 29, 1974, and pleaded not guilty.

Thereafter, a superceding indictment was found by the United States grand jury under Indictment #74 CR 1168 which charged this Defendant, along with a number of other co-Defendants with one count of conspiracy in that he violated Title 18 U.S.C., Section 371, 8 counts of a violation of Title 18 U.S.C., Section 844 (i) and 2, 20 counts of violation of Title 18 U.S.C., Section 1951 (a) and 2, and one count of a violation of Title 18 U.S.C., Section 1503 and 2. The Defendant pleaded not guilty on November 11, 1974.

This Defendant assisted the United States Attorney in the preparation for the trial of Indictment # 74 CR 1168, and he testified for the government at the trial of this indictment. The testimony that he gave at the trial was substantially the same as that which he gave at conferences with Assistant United States Attorney Feinberg prior to the agreement worked out herein.

The Judge, in charging the jury upon the trial of this Indictment characterized the Defendant's testimony as incredible and unbelievable. A motion, dated January 2, 1976 was made for

the judge to voluntarily disqualify herself from any further proceedings in this case. The motion was denied. On January 23, 1976, the Judge sentenced this Defendant to a period of five (5) years incarceration.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN FAILING TO VOLUNTARILY RECUSE ITSELF FROM SITTING IN ANY FURTHER PROCEEDINGS INVOLVING THIS DEFENDANT.

The American system of democracy and jurisprudence is based not only upon the concept of equality and fairness, but also upon the imposition and appearance of those qualities.

"...those entrusted with the awesome responsibility of administering justice should, so far as is reasonably possible, insure the fullest measure of dispassionate consideration and impartiality, rather than chance even the slightest taint or opprobrium however obscure, albeit real, to cast shadow or divert the fullest, fairest, impartial trial of the innocence or guilt of an accused in accordance with the ever fundamental tenets of Law, the highest ideals of our Anglo-American jurisprudence, and traditional concepts of justice." UNITED STATES v. VALENTI, 120 F. Supp 80.

In the instant case this Court failed to disqualify itself from sentencing this Defendant, although it had made a statement after hearing his testimony that indicated that it was biased and prejudiced toward him. "As a general rule, voluntary disqualification is an appropriate remedy in cases in which it may reasonably appear that the determination of the issues by the judge concerned

might be improper, even though the facts do not support such a supposition." UNITED STATES v. QUATTRONE, 149 F. Supp 240; Bradley v. School Board of City of Richmond, Virginia, 324 F. Supp 439.

A Defendant in a criminal case is entitled not only to a trial before a judge who is not biased against him during any stage of the proceedings, but even more important at the time of sentencing, he is entitled to a just and fair tribunal. UNITED STATES v. THOMPSON, 483 F. 2d 527.

The Judge further compounded the lack of the appearance of bias and prejudice towards the Defendant in her statement just prior to sentencing him: "In addition to the sentence in the Bronx, he apparently was placed on probation in the Bronx, because they didn't have all this about your background, did they, Mr. Cuadrado, at the time of your sentence in the Bronx and placed on probation? Did the Judge have all these convictions before him at that time?" Page 27 of Sentencing Minutes. The Judge, not knowing the contents of the probation report in Bronx County, carelessly assumes that Defendant's prior convictions were not in the report and that was the reason he was placed on probation. Certainly, such a conclusion by the Judge indicates bias and prejudice towards this Defendant.

Further, the following colloquy between the Court and the Assistant United States Attorney, Mr. Harris on Pages 29 and 30 of the Sentencing Minutes:

> THE COURT: And I see that the U.S. Attorney, Mr. Harris, according to the probation officer, characterized your cooperation on the stand as ludicrous.
>
> MR. HARRIS: That is inaccurate, your Honor. I believe that I never said that.

> THE COURT: On page 10 of the probation report the Probation Officer says the following: 'Assistant United States Attorney Jeffrey Harris, Southern District of New York, indicated that the defendant's cooperation on the stand was ludicrous.' I guess you didn't use those words as indicated. 'He felt that his cooperation was a sham and that Cuadrado, a friend of Robert Munoz, tailored his testimony accordingly.' Did you say that in substance to the Probation Officer?
>
> MR. HARRIS: Your Honor, with respect to Munoz, I said words to that effect, mainly to the effect that based on his friendship with Munoz and based on the other evidence the Government had, that with regard to his statements that Munoz had no knowledge of any of these acts, bombings or was privy to any discussions, I did feel that that testimony was a sham, yes. I did say that.

A fair interpretation of this exchange clearly indicates that the government in no way adhered to its agreement with this Defendant concerning a plea to the Court at the time of sentence, which would have the effect of keeping him from incarceration.

The co-defendant Munoz and Sims were placed on probation by the same judge although they were found guilty after a jury trial. Co-defendant Alicea was placed on probation by the same judge after pleading guilty to the same crime as this defendant.

These facts taken in connection with the judge's low opinion of the defendant as a witness and the government's position that the defendant's trial testimony was a sham lead to and buttress the conclusion of bias and prejudice to this defendant in this proceeding.

The totality of the facts and circumstances of this case has clearly indicated that this Defendant has been treated unfairly and unjustly. The establishment and the system of justice as applied to this Defendant has been clearly biased and prejudicial against him.

It is therefore urged upon this Court that although the legal elements necessary for a showing of personal bias and prejudice by the judge sitting in this case may not have technically existed, the interests of justice cry out and speak eloquently for reversing the Judge's decision not to voluntarily disqualify herself. Wolfson v. Palmieri, 396 F. 2d 121.

Point II

THE COURT ABUSED ITS DISCRETION WHEN IT IMPOSED A SENTENCE BASED UPON AN INACCURATE SUPPOSITION AS TO ONE OF THE DEFENDANT'S PRIOR CRIMINAL CONVICTIONS

The uniform rule in the federal courts is that a sentence imposed by a district judge within statutory limits is not subject to appellate review. United States v. Tucker, 404 U.S. 443. Gore v. United States, 357 U.S. 386.

However, where the sentence imposed is based upon materially false assumptions by the sentencing judge or reliance upon material inaccuracies, this court has vacated the sentence and remanded for resentence. United States v. Brown, 479 F. 2d 1170; McGee v. United States, 462 F. 2d 243.

Classic examples of false assumptions and inaccuracies are in statements by the Judge just prior to sentencing this Defendant:

Page 27 and 28 of Sentencing Minutes --

THE COURT: In addition to the sentence in the Bronx, he apparently was placed on probation in the Bronx, because they didn't have all this about your background, did they, Mr. Cuadrado, at the time of your sentence in the Bronx and placed on probation? Did the Judge have all these convictions before him at that time?

THE DEFENDANT: I think he did.

THE COURT: You think he did?

THE DEFENDANT: I think they have. The probation officer told me at that time that they my record.

THE COURT: That was in 1969 in the Bronx. You were sentenced on May 5, 1970 to five years probation. It

is your statement that they had these charges from Puerto Rico?

THE DEFENDANT: That's what the probation say. I think they send -- I don't know if they had them or not, your Honor.

THE COURT: You don't know, is that it?

THE DEFENDANT: I'm not too sure if they ha[illegible] But, as far as I say, my attorney Oscar Gonzalez Suarez, at that time he explained it to me that they have my record, they send for it in Puerto Rico, and they had it. And my probation told me so, too.

THE COURT: Prior to your sentence in the Bronx of five years probation for possession of a weapon, you had five prior convictions for possession of a weapon, isn't that so?

THE DEFENDANT: Yes.

Page 30 and 31 of Sentencing Minutes --

THE COURT: It also appears [illegible] I indicated, that you were given a suspended sentence in the Bronx without that Court having the benefit of your extensive criminal record in Puerto Rico.

MR. ZAPATA: Your Honor, may I speak on that? I was not his attorney at the time, but I'm familiar with cases in the Bronx and in the whole City of New York. I've represented many clients in the Bronx who took a plea and were convicted.

The Probation Department gets records regularly from Puerto Rico. They either get them through the FBI or they write directly to the Department of Justice in Puerto Rico and get them.

In all likelihood they did have this record. You would have to go into the actual background of the case to see why the District Attorney felt and the Court felt that this was a proper sentence. This is what I think happened in this case, that there were mitigating circumstances.

THE COURT: I don't know what happened, but it just impressed me that the Court probably didn't have that, because the presentence report reiterates the fact that these Puerto Rican convictions did not appear on his FBI rap sheet, as it is called.

> So the chances are they didn't have that in the Bronx when he was sentenced in 1970. The Probation Officer and the Government here has said that they didn't have it -- is that so? -- when he testified for the Government?

These statements should clearly indicate to this court that the sentencing judge made material false assumptions as to this defendant's prior criminal conviction in the Bronx and that the sentence imposed was one without informed discretion. United States v. Tucker, supra; United States v. Brown, supra.

There can be no conclusion save that the sentencing court employed a fixed and mechanical approach in sentencing this Defendant rather than carefully scruntinizing all of the factors relevant to a sentence upon an individual basis. United States v. Schwarz, 500 F. 2d 1350; Williams v. Oklahoma, 350 U.S. 576.

CONCLUSION

The judgment appealed from sentencing this Defendant to a period of incarceration of five years should be reversed and remanded for resentence.

Respectfully submitted,

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